IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1216

BRITISH AIRWAYS BOARD,
Petitioner,

v.

THE BOEING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Court of Appeals correct in unanimously affirming the District Court order of summary judgment based on petitioner's failure to present any evidence sufficient to create a material issue of fact that the alleged product defect caused the accident?

2. Was the Court of Appeals correct in determining that the District Court did not abuse its discretion in denying petitioner's request for leave to conduct further discovery when that request was made for the first time thirty-one days after the granting of summary judgment?

STATEMENT OF THE CASE

This action arises from the crash of a British Overseas Airways Corporation ("BOAC") 707 aircraft near Mt. Fuji, Japan in March of 1966. On May 18, 1973 BOAC sued the manufacturer, The Boeing Company ("Boeing"), in United States District Court for the Southern District of New York to recover the value of the destroyed aircraft. Jurisdiction was based exclusively on diversity of citizenship. This action and a subsequent action filed by BOAC in California were transferred to the District Court below and were consolidated for discovery and trial. Trial was set for November 8, 1976. Pet. App. 2a-4a.

Nearly three years after the filing of its first complaint, on May 17, 1976, BOAC moved for partial summary judgment on the ground that the fitting attaching the vertical fin to the structure of the aircraft ("fin attachment fitting") had a small crack, that the fitting was thus defective and that the defect caused the accident. Pet. App. 40a *et seq*. On August 17, 1976 Boeing filed its own motion for summary judgment on the grounds that (1) the only alleged defect was not causally related to the accident, and (2) the accident was caused by severe clear air turbulence considerably in excess of the design limit of the aircraft. Pet. App. 127a *et seq*.

On August 25, 1976 the parties stipulated that the hearing on their respective motions would be held on September 10, 1976. App. A hereto, pp. (1)-(2).

At the hearing on the cross-motions for summary judgment, BOAC contended that it, not Boeing, was entitled to summary judgment. Pet. App. 22a-39a. BOAC made no request that the decision on Boeing's motion be delayed

pending the completion of any incomplete discovery.

On September 23, 1976 the District Court granted Boeing's motion and denied BOAC's. The court concluded that "there is no evidence indicating that the crash resulted from, or was caused, in whole or in part, by [fatigue] failure [in the fin attachment fitting]" and that "[p]laintiff has been unable to produce any evidence that a contributing cause of the accident was a defect in the aircraft." Pet. App. 16a-17a.

On October 1, 1976 BOAC filed a one-sentence motion for reconsideration in the District Court. App. B hereto, p. (3). On October 26, 1976 BOAC filed a memorandum in support of this motion and contended for the first time that summary judgment should have awaited the conclusion of additional discovery. Pet. App. 14a. On November 15, 1976 the District Court denied BOAC's motion. The court ruled that BOAC could not belatedly claim the summary judgment ruling was precipitate when it agreed at oral argument on the cross-motions that the court was in a position to rule on the liability question. Pet. App. 18a-21a.

On November 8, 1978 the Ninth Circuit Court of Appeals unanimously affirmed the District Court decision. Pet. App. 1a-15a. The court carefully reviewed the evidence submitted by Boeing and BOAC in support of their cross-motions for summary judgment and concluded that BOAC had failed to identify any evidence contradicting Boeing's contention that there was no genuine issue of material fact as to causation. The court below also rejected BOAC's claim that a ruling on the motions for summary judgment should have awaited the completion of additional discovery. The court held that BOAC had failed

to make a timely request for this relief under Rule 56(f) of the Federal Rules of Civil Procedure, and in any event, BOAC had sufficient opportunity to obtain any relevant evidence. This petition followed.

REASONS FOR DENYING WRIT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW IN THIS CASE.

This case presents no important or unresolved issues requiring action by this Court. It is a diversity action where petitioner simply failed to produce any evidence which would have defeated Boeing's summary judgment motion. The legal standards applicable to a motion for summary judgment cannot be seriously questioned. They are set forth in Rule 56 of the Federal Rules of Civil Procedure and in numerous decisions of this Court and the lower federal courts. *See, e.g., First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968); *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *Doff v. Brunswick Corp.*, 372 F.2d 801 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967).

The issue in this case is whether those standards were properly applied by the Court of Appeals and the District Court to the specific evidence in the record. Four judges carefully reviewed that evidence and unanimously concluded that none of it was sufficient to create a material issue of fact as to a crucial element of BOAC's case—the existence of a causal relationship between the alleged defect and the accident. They further held that the ruling on Boeing's motion for summary judgment was not precipitate. The importance of these rulings is limited to the parties and claims in this case, and the traditional reasons for

granting a writ as set forth in Rule 19 of the rules of this Court are not met.* *See Appalachian Power Co. v. American Institute of Cert. Pub. Acc.*, 80 S.Ct. 16, 4 L.Ed.2d 30 (1959) (Brennan, J.).

II. THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE.

A. BOAC Presented No Evidence Sufficient To Create A Material Issue Of Fact As To Causation.

The Court of Appeals properly ruled that as the moving party, Boeing had the burden of establishing that there was no genuine issue of material fact as to the causation element of BOAC's claim. Pet. App. 5a. However, once Boeing met that burden with evidence that the crack in the fin attachment fitting did not cause the accident, BOAC had the burden of producing "significant probative evidence" in support of a contradictory contention. Pet. App. 6a; *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-90 (1968). After "diligently searching the record" and after "seeking the assistance of counsel at oral argument," the court below was unable to find "any evidentiary support for BOAC's position." Pet. App. 7a.

Boeing met its burden with two types of evidence, each of which demonstrated the lack of any triable factual issue. First Boeing produced substantial evidence establishing that the crack in the fin attachment fitting was irrelevant to the cause of the accident. Second Boeing produced evidence establishing that the accident was caused by severe turbulence creating gust loads in excess of what the aircraft was designed to withstand. This evidence included the testimony of those persons at BOAC most

*Indeed, petitioner does not even address the "Considerations Governing Review on Certiorari" set forth in Rule 19.

knowledgeable about the accident and BOAC's public and internal statements concerning the crash—statements that have never been retracted, repudiated or amended by BOAC.

As to the first point, Boeing introduced BOAC's own official accident report which stated: "The fin fitting was released to Boeing for detailed metallurgical examination and they concluded that these cracks were not an accident cause factor." Pet. App. 140a. Boeing then showed that BOAC's Chief Inspector of Accidents and its Air Safety Advisor had both testified in depositions that neither they nor anyone they knew of disagreed with Boeing's conclusion. Pet. App. 338a-342a. Boeing also submitted the affidavit of its Chief of Structures Research who averred that the aircraft would have crashed with or without the crack. Pet. App. 250a. Finally, Boeing submitted the technical report of the Royal Aircraft Establishment (a British government agency) that reached the same conclusion. Pet. App. 189a.

BOAC responded with two pieces of evidence. First, it referred to the deposition testimony of a Boeing employee that a crack in a fitting could lead to an accident. However, as the Court of Appeals stated:

> "[N]either that witness nor any other witness produced by BOAC has been able to produce specific facts showing, or even creating an inference, that the crack *did* lead to the accident in question. *The only statements we can find in the record that the crash was caused by a defective fin attachment fitting were made by counsel for BOAC.*" Pet. App. 7a, emphasis supplied.

Second, BOAC relied on the accident report of the Japanese Civil Aeronautics Board ("JCAB") which found that

the vertical stabilizer of the tail fin and the left horizontal stabilizer broke away before the rest of the aircraft disintegrated. Pet. App. 8a. This, according to BOAC, supported an inference that the aircraft first broke apart at the fatigue crack and that the crack caused the accident. However, the court below correctly observed that the JCAB found at least five in-flight failures, that the JCAB was unable to establish the sequence of those five failures and that, in any event, the JCAB agreed with Boeing that the probable cause of the accident was "abnormally severe turbulence." Pet. App. 8a.

The state of the record was that BOAC had no proof as to an essential element of its case—a causal relationship between the crack in the fitting and the accident. This alone justified the Court of Appeals' affirmance of the trial court. But the court went further and held that there was uncontradicted evidence establishing Boeing's explanation of the accident which also compelled affirmance. As the court observed, if there was severe clear air turbulence exceeding the design strength of the airplane, the accident would have occurred whether or not the fitting was defective.* Pet. App. 9a-10a.

Boeing supported its theory by introducing BOAC's own publications. First, the minutes of BOAC's Air Safety Committee stated:

> "It was noted that the cause of the accident was abnormally severe CAT which imposed excessive loads on the aircraft—beyond its design limits. Action taken over the years to inform all staff of the problems of turbulence was noted." Pet. App. 149a.

*Without explanation, BOAC contends that this determination was improper. Pet. Brief 22. However, not only is the determination obvious as a matter of logic, it is directly supported by the uncontroverted affidavit of Boeing's Chief of Structures Research. Pet. App. 251a.

Second, BOAC's official accident report quoted the JCAB report that the "probable cause of the accident" was "abnormally severe turbulence . . . which imposed a gust load considerably in excess of of the [aircraft's] design limit."* Pet. App. 134a. Third, other BOAC publications referred to the abnormal turbulence at Fuji that day. Pet. App. 158a, 160a. This evidence revealed just how deeply committed BOAC was to the same theory of causation as that advanced by Boeing.

Before the Court of Appeals, BOAC's counsel responded to this uncontroverted evidence of abnormally severe clear air turbulence with the deposition testimony of two witnesses. First, counsel referred to the testimony of the BOAC's Air Safety Advisor, Captain Nisbet, that he had never heard of a Boeing 707 aircraft breaking up in mid-air solely as a result of meteorological conditions. The Court of Appeals correctly observed:

> "However, Captain Nisbet did not say that this break-up could never happen. All he said was that he had never *heard* of it happening. Moreover, earlier in the deposition, he stated that he had no reason to disagree with Boeing's findings that the crack was not relevant to the cause of the crash. Nisbet deposition, at 87-89." Pet. App. 11a.

Second, BOAC's counsel relied on the deposition testimony of one of BOAC's meteorologists, Ernest Chambers. However, that deposition was not submitted by BOAC to the

*Contrary to BOAC's assertion, Boeing and the District Court did not rely "solely" upon the JCAB report to establish the cause of the accident. Pet. Brief 18. Furthermore, BOAC's objections to the admissibility of that report are without merit. Pet. Brief 21 n.9. It was BOAC, not Boeing, that introduced that report. Pet. App. 123a. And to the extent Boeing referred to the JCAB report at all, it was through quotations in BOAC's own accident report, which was admissible as an admission. F.R. Evid. 801(d)(2).

District Court until long after Boeing's motion was granted; permission for its late filing was neither sought nor obtained; and the Court of Appeals properly rejected it as untimely. *See Sound Ship Building Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 101 n.3 (3rd Cir.), *cert. denied*, 429 U.S. 860 (1976); *City Electric, Inc. v. Electrical Workers Local 77*, 517 F.2d 616, 617 (9th Cir.), *cert. denied*, 423 U.S. 894 (1975). In its petition, BOAC does not appear to dispute the correctness of that holding. Pet. Brief 21. In any event, as the court below noted, Chambers "confessed that he did not actually know whether or not a strong mountain wave could break up an aircraft." Pet. App. 12a. Thus, even if considered, Chambers' testimony would not create a material issue of fact.

In sum, there was simply no evidence in the record to create a material issue of fact. Rather, as the Court of Appeals held:

> "After twelve years of investigation and litigation, all BOAC has come up with is supposition, speculation, and conclusory argument of counsel. Because it has presented no evidence 'sufficient * * * to require a jury or judge to resolve the parties' differing versions of the truth at trial,' even after all permissible inferences have been drawn in its favor, we hereby affirm the decision of the court below as to this issue." Pet. App. 12a.*

*BOAC contends that the District Court improperly determined that by virtue of their cross-motions for summary judgment, the parties agreed that there were no material facts in dispute. Pet. Brief 29. There is no support in the record for this contention. Moreover, even if there were, the contention would still be irrelevant. The Court of Appeals correctly observed that on appeal from an order granting summary judgment it "appl[ies] the same rule as applied below, i.e., whether there is any genuine issue of material fact." Pet. App. 5a n.6. Thus, there is no dispute that the Court of Appeals applied the correct standard.

B. BOAC's Belated Assertion That It Needed Further Discovery Is Without Merit

BOAC asserts that the District Court should not have ruled on Boeing's motion for summary judgment until BOAC had conducted additional discovery. Pet. Brief 23. Rule 56(f) of the Federal Rules of Civil Procedure provides a specific means by which BOAC could have sought a stay of the hearing on Boeing's motion to permit that discovery. As BOAC concedes in its petition, it did not comply with this rule. Pet. Brief 25. Indeed, BOAC made no reference to the alleged relevance of that discovery to the Boeing motion until thirty-one days *after* the motion was granted. As the Court of Appeals held, BOAC "can hardly argue at this late date" that the summary judgment ruling was precipitate. Pet. App. 14a.

Nevertheless, BOAC now relegates its failure to follow Rule 56(f) to a "technicality" and asserts that the rule should not be applied to "punish" it when the court was otherwise aware of the incomplete discovery. Pet. Brief 27. BOAC advances no reasons why it should be exempt from the requirements of Rule 56(f). Moreover, BOAC never made known to the District Court *in any way* that it needed to conduct discovery before responding to Boeing's motion. Rather, BOAC itself first moved for summary judgment; it stipulated to the hearing date on its motion and Boeing's motion; and the tenor of all of its papers filed prior to the order granting summary judgment was that the court had sufficient evidence to decide the cross-motions in BOAC's favor. Pet. App. 40a-126a, 312a-328a, 344a-362a. As the Court of Appeals held:

> "Except for the brief statement at oral argument that the uncompleted discovery would 'further substantiate' BOAC's allegations that the fatigue cracks caused the accident by causing the fin to break off, BOAC never gave the court any reason to believe that the discovery would create a genuine issue over a material fact." Pet. App. 14a.

Even when it filed its motion for reconsideration on October 1, 1976, *after* Boeing's motion was granted, BOAC failed to mention the asserted importance of this discovery. App. B, p. (3).

Futhermore, the Court of Appeals seriously questioned the materiality of this discovery to Boeing's summary judgment motion since there was no showing by BOAC that the depositions would have "any bearing on the issue of whether the plane encountered CAT in excess of its design strength." Pet. App. 13a n.12. *See P.A.M. News Corp. v. Butz*, 514 F.2d 272, 278 (D.C. Cir. 1975) (immateriality of proposed discovery justified denial of Rule 56(f) request). Finally, the court below found that BOAC had sufficient opportunity in the *ten years* between the accident and the summary judgment hearing to obtain evidence on the causation issues. Pet. App. 15a.

For all of these reasons, the District Court did not abuse its discretion in refusing BOAC's belated request for additional discovery, and the Court of Appeals correctly affirmed. *See Daily Press, Inc. v. United Press Int'l*, 412 F.2d 126, 135 (6th Cir.), *cert. denied*, 396 U.S. 990 (1969); *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932, 938 (5th Cir.), *cert. denied*, 389 U.S. 832 (1967).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BRITISH OVERSEAS AIRWAYS CORPORATION, *Plaintiff,* v. THE BOEING COMPANY, *Defendant.*	NOS. C74-380S C74-257S STIPULATION AND ORDER RE FILING DATES FOR VARIOUS PLEADINGS

IT IS HEREBY STIPULATED by and between plaintiff British Overseas Airways Corporation ("BOAC") and defendant The Boeing Company ("Boeing"), by and through their respective counsel of record and subject to the approval of this Court, as follows:

(1) BOAC shall file its Response to Defendant Boeing's Motion for Summary Judgment and shall deliver a copy thereof to the offices of Boeing's Counsel in this matter on September 6, 1976

(2) BOAC's Motion for Summary Judgment and Boeing's Motion for Summary Judgment each have a hearing date of September 10, 1976

(3) The Pretrial Order, brief and instructions now due to be filed by August 27, 1976, at the request of BOAC, shall be filed by October 1, 1976
(BOAC shall serve Boeing with a copy of its Pretrial Order on September 24, 1976.)

(4) The Pretrial Conference now scheduled for September 14, 1976, at 4:00 p.m. be continued to a date to be set by the Court in October, 1976

DATED this 25th day of August, 1976.

BOGLE & GATES

By [signature]
William L. Parker of
Attorneys for Plaintiff
BOAC.

PERKINS, COIE, STONE, OLSEN & WILLIAMS

By [signature]
John D. Dillow of Attorneys
for Defendant The Boeing
Company

ORDER

It is so ORDERED this 27th day of August, 1976.

[signature]
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRITISH OVERSEAS AIRWAYS CORPORATION, *Plaintiff,* v. THE BOEING COMPANY, *Defendant.*	NOS. C74-257S C74-380S MOTION FOR RECONSIDERATION

COMES NOW the plaintiff, British Overseas Airways Corporation, and pursuant to Fed.R.Civ.P. 59, hereby moves the Court to reconsider its Order on Summary Judgment Motions and Judgment dated September 23, 1976.

DATED this 1st day of October, 1976.

BOGLE & GATES

By [signature]
William L. Parker
and
CONDON & FORSYTH
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